Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

WETLANDS ACTION NETWORK, *et al.*,
Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

1. *The Corps Did Not Follow Its Own Regulations.* Both the U.S. Army Corps of Engineers ("the Corps") and Playa Capital, LLC ("MTP-PV") rely on the Corps' regulations. Brief for the Federal Respondents in Opposition ("Fed. Opp."), pp. 14-15; Respondent Playa Capital Company, LLC'S Brief in Opposition ("MTP-PV Opp."), pp. 6-8. Their reliance is misplaced. As the Corps states (Fed. Opp. 14), "petitioners have not challenged" the Corps' regulations. Even though the cited regulations (33 C.F.R. Part 325, App. B, Section 7(b)) are of dubious validity, petitioners have not challenged them because the Corps clearly did not follow them.

According to the Corps' regulations, the Corps must weigh several factors in determining whether to prepare an environmental impact statement ("EIS") (33 C.F.R. Part 325, App. B, Section 7(b)(2)):

> The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action. Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:
> (i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project). (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity. (iii) The extent to which the entire

> project will be within Corps jurisdiction. (iv) The extent of cumulative Federal control and responsibility.

Thus, the regulations specifically require that the Corp consider impacts where "environmental consequences of the larger project are essentially products of the Corps permit action."

The district court found that the project was a product of the Corps permit action. It stated: "The fill of wetlands and the creation of the 51.1 acre system does not have 'independent utility' such that Defendants would reasonably consider constructing it in isolation" and the "wetland fill would not be justified in the absence of the mixed-use development." Pet. App. 65a. The court of appeals agreed: "The district court's determination that the project would not be able to proceed as planned without the permit and that the filling of the wetlands would not occur without the project is correct." Pet. App. 21a. As discussed in the Petition (Pet. 17-20), despite this explicit agreement with the central factual finding of the district court, the court of appeals then immediately stated that this type of interdependence is not important since "[i]f this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects * * *." Pet. App. 21a-22a.

Thus, the Corps and the court of appeals relied entirely on subsection (iii) of the regulations involving the Corps' lack of jurisdiction over major parts of the project. In doing so, the Corps did not follow its own regulations in their entirety.

Subsection (ii) of the Corps' regulations is particularly applicable to this case. Aspects of the upland portion of the project in the immediate vicinity of the wetlands affect the location and configuration of the wetlands permit. The environmental assessment stated that preserving the wetlands would "eliminate crucial linkages in the applicant's proposed local street grid system, compromising the achievement of the

applicant's planning objective of a traditional town model as an alternative to suburban development and its dependence on automobile use." 8 AR 3731. In addition, the district court found that the "fill of the wetlands as provided for under the Permit and the overall development on the Playa Vista property are inextricably intertwined, and are 'connected actions,' under applicable regulations." Pet. App. 65a.

The Corps concluded in the EA that an EIS was not required. 8 AR 3769. In reaching this conclusion, the Corps determined that it "need not include substantial[1/] consideration of development in the uplands because development could occur in those areas regardless of whether this permit application is granted." *Ibid.* Thus, the Corps decided not to consider the impact of the upland development because "such development was outside its jurisdiction." Pet. App. 11a. The court of appeals explicitly upheld the Corps' decision on this basis. Pet. App. 23a. Since the Corps' regulations were not followed in their entirety, their validity is not directly implicated in this case.

The Corps cites (Fed. Opp. 5) examples from its regulations of the appropriate scope of NEPA analysis. The regulations state that the Corps need not consider an upland industrial facility when the only Corps permit relates to "a connecting pipeline, supply loading terminal or fill road." 33 C.F.R. Part 325,App. B, Sec. 7(b)(3). The regulations further state that the NEPA consideration of the upland facility does not extend "beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity." *Ibid.* However, this example does not support the Corps' determination in this case.

The uplands portions of the project in this case are in the immediate vicinity of the regulated activity (*i.e.* the filling

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1/In actuality, the Corps gave no consideration to the upland development because it based its Finding of No Significant Impact on the portion of the EA discussing only the wetlands. *See* Pet. 15.

of the wetlands and creation of a freshwater wetland system) and affect the location of the regulated activity. As the Corps recognizes (Fed. Opp. 6), there are 17 patches of wetlands "scattered across the Playa Vista Property," which comprise a total of 16.1 acres. The Corps specifically found in the EA that "the filling of these areas are [sic] for development of proposed mixed-use development and supporting infrastructure" (8 AR 3729) and that without the filling of these wetlands "crucial linkages" in the development would be eliminated (8 AR 3731). Thus, Corps regulations demonstrate that the impacts of the entire development should have been considered.

In sum, the Corps did not consider the factors explicitly set forth in the regulations in determining not to prepare an EIS. It relied entirely on subparagraph (iii) and perhaps subparagraph (iv), which relate to whether the Corps had jurisdiction. The Corps did not consider in any way subparagraph (ii) which is clearly relevant to the facts of this case. Thus, respondents cannot rely on the Corps' regulations as justifying the Corps' failure to prepare an EIS. On the contrary, the Corps' failure to follow its regulations and its adoption of the position that no harm need be considered outside its jurisdiction, further supports petitioners' contentions that the decision of the court of appeals was erroneous and that the issue is of great national importance.

2. *The Corps' Decision Involved an Error Law Which Is Not Entitled to Deference.* Respondents attempt to characterize this case as whether "the Corps did not abuse its discretion in assessing the environmental impacts of the challenged permit" (Fed. Opp. 13) and whether the Corps applied its regulations in an arbitrary and capricious manner (MTP-PV Opp. 4-5). Federal respondents also cite *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), for the proposition that the Corps' decision to consider the environmental harm only from activities within the Corps' jurisdiction "is entitled to

substantial deference and is reviewable only for abuse of discretion." Fed. Opp. 14. These arguments might be correct if the Corps had weighed a variety of permissible factors in making its decision. However, as the court of appeals made clear, the Corps based its decision solely on the ground of its lack of jurisdiction. Pet. App. 11a. This determination was a clear error of law in violation of the National Environmental Policy Act ("NEPA"), which is not entitled to deference.

Both the Corps and MTP-PV also suggest (Fed. Opp. 22; MTP-PV Opp. 22) that a writ of certiorari should not be granted because this case revolves around a "fact-bound" determination. On the contrary, the decision of the court of appeals was based on its legal conclusion that the Corps was not required to consider the environmental impacts of the project resulting from the components of the project that were outside its regulatory jurisdiction. Pet. App 23a. This holding makes the federal agency's regulatory jurisdiction controlling as to the impacts to be considered in fulfilling NEPA requirements. This was a legal determination which is entirely appropriate for review by this Court.[2/]

3. *The Court of Appeals Decision Conflicts with this Court's Decision in Robertson v. Methow Valley Citizens Council and Decisions of Other Courts of Appeals.* The Corps contends (Fed. Opp. 16) this Court held in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), that the Forest Service was required to consider in its EIS only the harm emanating from the part of the project within the Service's jurisdiction. *Robertson* involved a developer's application "for a special use permit to develop and operate its proposed 'Early

[2/]Contrary to the Corps' argument (Fed. Opp. 15), petitioners do not argue that the Corps has jurisdiction over the entire project. Instead, petitioners contend that when deciding whether to prepare an EIS, the Corps must consider impacts from the entire project, even though some impacts are outside its regulatory jurisdiction. NEPA requires a federal agency to examine the full environmental effects of its actions. This includes impacts that are outside its regulatory jurisdiction.

Winters Ski Resort' on Sandy Butte and an 1,165-acre parcel of land it had acquired adjacent to the National Forest." *Id.* at 338. In the chapter on "Environmental Consequences" of the EIS, "[a]s is true of other subjects, the discussion included an analysis of cumulative impacts over several years *resulting from actions on other lands as well as from the development of Sandy Butte itself* (emphasis added)." *Id.* at 339-340. The EIS specifically concluded that although the proposed developed of the ski area "will not have a measurable effect on existing or future air quality," the off-site development of private land "will have a significant effect on air quality * * *" (internal citations omitted)." *Id.* at 340. If federal agencies must analyze the impacts of off-site activities in EIS's, as in *Robertson*, they must consider the impacts of the same activities in determining whether to prepare environmental impact statements.

The Corps and MTP-PV argue (Fed. Opp. 19; MTP-PV Opp. 12) that the court of appeals' decision in this case does not conflict with *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985), because the First Circuit recognized that building the causeway and port would lead to further development but that in the present case development would occur regardless of the permit. However, the EA here explicitly stated that most of the scattered wetlands were being filled "for development of proposed mixed-use development and supporting infrastructure." 8 AR 3729. In addition, the EA said that "[t]he requested action *would result* in the implementation of the first of three applications for dredge/fill associated with development of Playa Vista (emphasis added)." 8 AR 3728. The Corps also specifically admitted in the EA that MTP-PV proposes to fill wetlands "in order to accomplish the goals of Playa Vista project in Areas B, C, and D." *Ibid.* Morever, the permit in Phase I included the development of the freshwater wetland system "to compensate for impacts associated with subsequent development phases including development in Area A." *Ibid. See* Pet. App. 7a. The fact that MTP-PV concluded

"there was no practical alternative way to accomplish its purpose of building" the development without filling the wetlands, underscores that filling the wetlands would lead to further development of Playa Vista. Pet. App. 8a. 8 AR 3731.

The Corps also argues (Fed. Opp. 20) that *Society Hill Towers' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000), does not conflict with the decision in the present case. The Corps states that while "the cumulative impacts of the project in *Society Hill* were 'virtually certain,' the opposite was true here" since "at the time MTP-PV applied for the Phase I permit, uncertainty clouded Phases II and III" of the MTP-PV project. Fed. Opp. 20. However, the record shows that the upland portions of Phase I of the project were virtually certain to proceed. Pet. 8, 11-15; Pet. App. 11a; 8 AR 3767. Thus, at the various least, all the impacts of the upland development in Phase I should have been considered in determining whether to prepare an EIS. Morever, there is ample evidence that the other phases were not speculative. The EA recognized that MTP-PV's "requested action would result in the implementation of three applications" and the EA discussed the entire project. 8 AR 3728. There is no evidence in the record to suggest that MTP-PV did not plan to complete any of the later phases.

MTP-PV argues (MTP-PV Opp. 13-16) that *Sierra Club v. United States Forest Service*, 46 F.3d 835 (8th Cir. 1995), and *Society Hill Towers' Ass'n v. Rendell*, *supra*, involve only the proper content of EA's rather than scope of the project that must be considered in determining whether an EIS must be prepared. MTP-PV admits that an EA or EIS must consider three kinds of impacts from a project, direct, indirect and cumulative. Here, as petitioners have previously shown (Pet. 11-15), the EA did discuss the cumulative impacts of the entire project. There is no justification for an agency to discuss all the impacts of the project in an EA, but then ignore most of the impacts in determining that the project has No Significant Impact. The principle purpose of an EA is to provide the basis

for the agency's determination as to whether an EIS must be prepared. Simple common sense dictates that all the impacts of the project be considered in determining that the project has no significant impact and therefore an EIS is not needed.

The Corps argues (Fed. Opp. 19) that the court of appeals' decision does not conflict with the cases cited by petitioners cite because the Corps does not have an "obligation to include within the definition of federal action the actions of third parties that are beyond its jurisdiction." However, the actions which petitioners claim that the Corps were required to consider were not the actions of third parties, but, instead, were part of the same project and were vital to the viability of the project as a whole. If a federal agency must consider impacts of activities that are not even a part of the project under consideration and are not within the regulatory authority of the federal agency involved (*see* Pet. 22-24), it *a fortiori* must consider impacts of activities which are part of the same project, whether or not they are outside its regulatory authority.

4. *The Project Threatens Serious Harm to Wetlands.* Respondents claim (Fed. Opp. 10; MTP-PV Opp. 2-3) that the proposed freshwater wetland system would be beneficial, the wetlands are of limited value, and that much of the wetlands have been filled. The opinions of the courts below and the record do not support these statements.

First, the Corps says (Fed. Opp. 10) that "the proposed action would actually result in a net *increase* in wetland values, because it called for the replacement of 16.1 acres of highly degraded wetlands with 51 acres of higher-value riparian and freshwater wetland habitat (emphasis in original)." Fed. Opp. 10. The 51-acre freshwater wetland system, more properly labeled a pollution run-off and detention system,[3/] is highly controversial. There is sharp disagreement over its effectiveness as mitigation for the destruction of the saltwater

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[3/]The basin would be a shallow lake with a surrounding weed patch and would be unlikely to provide significant habitat values. Mat. Dec., para. 8.

wetlands. The court of appeals noted there were "many agency and public comments criticizing the freshwater system," including comments that the system was not feasible and would have harmful impacts on the environment. Pet. App. 28a. These concerns were expressed by MTP-PV's own Field Team Members and, most significantly, by numerous federal agencies, such as the Environmental Protection Agency[4/] (EPA); National Marine Fisheries Service (NMFS), and U.S. Fish and Wildlife Service (USFWS). Mattoni Dec., para. 13 (MTP-PV's Field Team); 4 AR 1813 (EPA); 4 AR 1776 (NMFS); 4 AR 1792 (USFWS); 8 AR 3683 (USFWS).

The district court found that MTP-PV had not demonstrated that the proposed system would be functional due to its untested nature and emphasized that "NMFS, EPA, and FWS questioned whether the proposal is environmentally sound." Pet. App. 85a. The district court concluded: "[t]he Court has carefully examined the evidence presented and finds that the Corps' decision to issue the Permit given the untested nature of the retention basin was arbitrary, capricious, and otherwise not in accordance with the law." Pet. App. 75a. The questionable and untested nature of the pollution run-off system seriously undermines the Corps' contention that the proposed action would be an environmental improvement.

Second, respondents (Fed. Opp. 6; MTP-PV Opp. 2) claim that the wetlands in this case are degraded. However, as discussed in the Petition (Pet. 6), the record shows that the wetlands can be restored. 6 AR 2937; 6 AR 2919. Indeed,

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[4/]The Corps states (Fed. Opp. 8) that "EPA did not question the Corps' preliminary determination that an EIS was not required." This statement is not supported by the record. In its response to the Corps' notice of intent to issue the permit, EPA stated that "[n]umerous contradictory and unclear statements in the SOF [Statement of Findings] and Special Conditions should be rectified" and then listed inconsistencies in the Corps' SOF. 8 AR 3470. EPA was discussing the part of the SOF that was intended "to justify why an EIS is not required." *Ibid.* Thus, EPA was questioning the Corps' determination that an EIS was not required.

MTP-PV, the developer, admits that reconstruction is possible. Opposition to Petitioners' Application for Rule 23 Stay, p. 12.

Third, the Corps states (Fed. Opp. 10) state that "[m]any of the wetlands covered by the permit have already been filled." However, Marcia Hanscom, Executive Director of Wetlands Action Network, one of the petitioners in this case, visited the area on June 12, 2001. She observed numerous wetland areas where the wetlands are intact and ponded water, wetland soil and wetland vegetation remain. Even several of the wetlands that were partially bulldozed several months ago retain water and soil characteristics of wetlands and some of these areas also retain vegetation. On several occasions when MTP-PV partially bulldozed areas at the site in the past, the vegetation has returned after a short time period when left alone.

As respondents' briefs make clear, the facts concerning the environmental harm (or, as respondents would have it, benefit) are in sharp dispute. However, this is precisely the reason why an EIS is essential. Under NEPA, this is not a decision for the courts. Instead, NEPA mandates that the agency make this decision based on the environmental analysis required by the statute.[5/]

CONCLUSION

For the foregoing reasons and those set forth in the petition, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,
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June 25, 2001

[5/]The Corps notes (Fed. Opp. 7) that the Corps has determined that an EIS is required for Phases II and III, which have since been merged. However, even if this EIS addresses impacts from the entire project, including Phase I, the harm from the Phase I development will have already occurred. NEPA requires the preparation of an EIS before an action is commenced.